SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1025

STATE OF MONTANA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinions of Courts Below.

Condemnation by the United States against the State of Montana, and certain individuals, to acquire certain tracts of state owned school land in the State of Montana. The decision of the United States District Court for the District of Montana, dated March 31, 1942, and its order entered April 10, 1942, are not yet officially reported but appear at pages 53 and 58 respectively of the record.

The opinion of the Circuit Court of Appeals, Ninth Circuit, dated March 6, 1943, is not yet officially reported but appears in the printed record at page 76.

II.

Jurisdiction.

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347.

2. The decree to be reviewed was entered March 6, 1943 (R. 81).

3. The following questions are raised in this Court on the record:

(a) May the United States in a suit against the State, under authority of Title II, Sections 202, 203 (48 Stat. 200), as extended by the Emergency Relief Appropriation Act (49 Stat. 115), and under the Act of August 1, 1888 (25 Stat. 357), condemn state owned school lands granted by the federal government under the Enabling Act (25 Stat. 676)?

(b) Is the decision of the Supreme Court of the State of Montana in the case of State ex rel. Galen *v.* District Court, 42 Mont. 105, 112 Pac. 706, interpreting the Enabling Act, the State Constitution and the Laws of the State, binding upon the Federal Court in the instant case?

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari, and in the interest of brevity are not repeated here.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the lands in question are subject to condemnation under the pro-

visions of the Industrial Recovery Act (48 Stat. 200) and the Act of August 1, 1888 (25 Stat. 357).

2. The Circuit Court of Appeals erred in holding that the decision of the Supreme Court of the State of Montana (the highest court in the State) is not controlling in the instant case.

3. The Circuit Court of Appeals erred in reversing the order of the United States District Court dismissing the action as to the State of Montana and insofar as it relates to school lands belonging to the State of Montana.

V.

ARGUMENT.

Summary of Argument.

Point A. The Circuit Court should have held that in view of the pleadings in this case which predicated authority for condemnation on the National Industrial Recovery Act, and the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), and the Act of August 1, 1888 (25 Stat. 357), state owned school lands could not be acquired by the federal government without the consent of the State.

While the power of eminent domain is inherent in the federal government as a right of sovereignty, such power does not exist in any executive office or department of government except through authority expressly given by Congress.

United States v. *Certain Lands in the Town of Newcastle*, 165 Fed. 783, 785.

The National Industrial Recovery Act does not authorize condemnation of lands for the purpose of providing a sanctuary for propagation and protection of migratory water fowl.

Section 202 of the Act (set out in the Appendix) authorizes the administrator, under direction of the President, to prepare a comprehensive program of public works, and specifically sets out the character of such works. The project for which the lands here in question are sought to be condemned, is not one therein mentioned.

Section 203 (a) of the Act (set out in Appendix) authorizes the President, through the administrator or through such other agencies as he may designate or create "* * * (3) to acquire by purchase, or by exercise of power of eminent domain, any real or personal property in connection with the construction of any such project * * *." The words "such projects" refer to those projects authorized by Section 202, which, as we have heretofore pointed out, does not include the project under which the lands here in question are sought to be condemned.

The Act of August 1, 1888, vests no authority in any executive office to procure real estate by condemnation, but vests jurisdiction in federal courts, and establishes methods of procedure, wherever authority has been or might thereafter be given, referring those courts to some other law for such authorization.

United States v. *Certain Lands in the Town of Newcastle*, 165 Fed. 783, 785;

Town of New Bedford v. *United States*, 23 F. (2d) 453 at 455.

In its opinion (R. 78) the Circuit Court says that the Act authorizes the acquisition of "any" real property in connection with the construction of any project in the program of public works prepared by the administrator. We submit that the Court was in error in its interpertation of the Act, for, as pointed out above, the Act only authorizes condemnation for the character of projects mentioned in Section 202.

And finally on this point, we submit that the weight of authority on the status of granted school lands under an Enabling Act is to the effect that such grants under a solemn pact between the federal government and the state, being an unalterable condition of admission, are appropriations to the state which can not be divested.

Beecher v. *Witherby*, 95 U. S. 517, 24 L. Ed. 440;
Morrison v. *United States*, 212 U. S. 29, 35.

Point B. The Circuit Court should have held, as did the District Court, that the decision in the case of *State ex rel. Galen* v. *District Court, et al.*, 42 Mont. 105, 113, 117, 112 Pac. 706, is controlling on the federal courts (R. 57).

The Circuit Court in its opinion (R. 79) says that the decision in the Galen case is an interpretation of the federal statute (the Enabling Act), and for such reason is not binding on the federal courts. We agree with the principle of law stated, but submit that the decision was also an interpretation of the State Constitution, which is binding upon federal courts. The Court, in the Galen case, based its opinion not alone upon the provisions of the Enabling Act, but also upon the provisions of Section 1 of Article XVII, and upon Section 7 of Ordinance No. 1, appended to the State Constitution. (See page 113 of Montana Citation—42 Montana Reports.)

Erie Railroad Company v. *Tompkins*, 304 U. S. 64;
Moody v. *Toole County Irrigation District*, 125 F. (2d) 498;
Schodde v. *Twin Falls Water Co.*, 224 U. S. 107.

The construction by the Courts of a state of its Constitution and Statutes, is, as a general rule, binding on the Federal Courts.

Bucher v. *Cheshire Railroad Co.*, 125 U. S. 555, 584;
Forsyth v. *Hammond*, 166 U. S. 506, 518;
Jones v. *Western Union Telegraph Co.*, 18 F. (2d) 650.

Point C. The Circuit Court of Appeals should have affirmed the order of the Federal District Court, which held that under the decision of the highest Court of the State, the Supreme Court, in the case of *State ex rel. Galen* v. *District Court*, 42 Mont. 105, 112 Pac. 706, under the Enabling Act and the State Constitution, state owned school lands are not subject to condemnation.

The Enabling Act and the applicable provisions of the State Constitution should be read together.

This rule, the Supreme Court in the case of *Galen* v. *District Court*, 42 Mont. 105, 112 Pac. 706, followed, and its decision is binding upon the federal courts in the instant case.

The question involved is one of great importance, which, so far as our research has determined, has not been decided by this Court. The principles involved affect every state in the Union having lands under grant from the federal government for support of their schools. The question should therefore be passed on by the highest court of the United States.

VI.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that errors herein pointed out may be corrected; that the law may be properly and authoritatively defined, and that the Decree of the United States Circuit Court of Appeals of the Ninth Circuit should be reversed and the Order of the United States District Court for the District of Montana be affirmed, in order that justice may be done to petitioner; and that to such an end a writ of certiorari should be granted and this Court should review the

decision of the United States Circuit Court of Appeals of the Ninth Circuit and finally reverse it.

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